



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 621 OF 2013

KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE.....APPELLANT

VERSUS

EUNICE F.W. MWAI.....RESPONDENT

*(Appeal from the original judgment and decree of Hon. Mr. C. Obulutsa (Ag. C.M.) in Nairobi
CMCC No. 9722 of 2002 delivered on 28st November, 2013)*

JUDGMENT

1. The Respondent sued the Appellant seeking judgment the sum of KShs. 843,691/= comprising of the following:-
 - a. Golden handshake KShs. 100,000/=
 - b. Employer-Employee contributions to the pension fund at Kenya National Assurance from 1st January, 1993 to 1st July, 1996 KShs. 43,755/=
 - c. Gratuity for 12 years from 1990-2001 at the rate of 3 months basic salary for every year of completed service KShs. 381,420/=
 - d. Provident fund from July 1996 to July 2001 KShs. 266,016/=
 - e. 10 ¹/₂ months salary @ KShs. 5,000/= per month KShs. 52,500/=

2. It was the Respondent's claim that she was employed by the Appellant in the year 1996 as a typist on permanent and pensionable terms. On diverse occasions thereafter, the Appellant increased her salary from time to time and was at the material time earning gross monthly salary of KShs. 15,060/=. By a letter dated 3rd May, 2001, the Appellant notified her to vacate her place of employment with effect from 11th May, 2001 and was sent on compulsory leave till 31st July, 2001 when she was to be deleted from the payroll. She alleged that together with the letter, the Appellant sent to the Respondent a form for the plaintiff to fill her particulars. That in the recital to the said form the Appellant informed the Respondent that she had been identified for retrenchment and it requested her to provide the Appellant with her particulars. In addition, it provided that the Appellant would be paid a golden handshake of KShs. 100,000/=, severance pay of three (3) months basic salary for every completed year of service prior to July, 1990, three (3) months' salary in lieu of notice and pension from the provident fund from 1st July, 1996. The Respondent's contention was that in writing the letter the Appellant ignored that; she had been in employment since the year 1986 to 2001 and was entitled to gratuity for 16 completed years of service and not 5 years; she was from the year 1993 to 1st July, 1996 making contributions to the pension scheme operated by the Appellant with Kenya National Assurance and there was a pending claim between her and the Appellant for 10 ¹/₂ months salary due to her from the

- Appellant for the period that she was illegally sent away on suspension.
3. The Appellant denied the Respondent's claim and averred that it engaged the Respondent on contractual terms between 1st July, 1986 to 30th June, 1992. It was stated that upon expiry of the contract, the Respondent was paid all her dues and no alleged gratuity, provident fund or pension is outstanding. It was stated that the Respondent was appointed as a copy typist II JG "H" TR and confirmed thereon on 12th March, 1998. The Appellant contended that it was a term of employment agreement that both parties would contribute to the provident fund within the Insurance Company of East Africa Ltd and that upon retirement, the sums due KShs. 146,772/= were paid to the Respondent on 8th June, 2001. It was stated that the provident scheme with Kenya National Assurance Co. Ltd became irrecoverable and unpayable upon the insurer's insolvency and liquidation. The Appellant held the position that it was not liable in law to subrogate Kenya National Assurance Co. Ltd on the provident fund. As regards the claim on unpaid salary during the suspension, the Appellant stated that no such moneys were payable under the terms and conditions of the Respondent's employment. It was the Appellant's contention that the Respondent's conduct as an employee was irresponsible, incorrigible and indisciplined such that the Respondent at different times in her career was suspended, demoted and found thoroughly unsustainable for receiving a salary during suspension. It was averred that the Respondent's termination occurred alongside 243 other employees retrenched by Government Directives and the Appellant had no power to alter, vary or influence the Respondent's termination or retention. It was stated that the contract of employment was frustrated by Government decisions and it being a Government owned institutions had no discretion in the issue. The Appellant contended that claims such as the Respondent's are barred by Limitation of Actions Act or waived by the Respondent when she was employed on permanent terms. It was stated that the Respondent's terminal benefits were determined by the Ministry of Agriculture and Directorate of Personnel Management and her claim of KShs. 843,691/= was erroneous, vexatious and unfounded in law.
 4. The Respondent's testimony was that she was working with Kenya Trypanosomiasis Research Institute (KETRI) and was dismissed in the year 2001. She stated that she and others were given letters indicating that they will be paid several months salary, golden handshake. She stated that she was not paid golden handshake since it was claimed that she was more than 51 years old. She was paid service pay and given a cheque of KShs. 146,016/=. She stated that while in employment, she had joined the provident fund scheme and 15% of her salary was directed to the said fund. She stated that at the time of retirement she used to earn KShs. 1560/= as gross salary. She indicated that she was not covered in the National Social Security Fund. She stated that she was dismissed and reinstated by the Ministry of Agriculture and that she had worked for 10 ¹/₂ months without payment. She denied being redundant. On cross-examination the Respondent stated that she was employed in the year 1986. She worked on contractual terms for three (3) years and was thereafter dismissed. She appealed and was reinstated on 3rd August, 1992 and suspended the following day and requested to go through disciplinary process. She wrote a letter of apology and was re-employed. She was posted to Malindi but when she reported she was not allowed to get to the office. She was only allowed in June, 1993. She was dismissed for gross misconduct. She stated that she has never received any compensation from RBA since 2001 and that at the time her employment was termination she was aged 55 years.
 5. DW1, Teresia Wakora who was the administrative officer in charge of human resource management testified that there was rationalisation to retire staff. The first phase was for staff aged 52 years and above in which the Respondent belonged and Phase 2 touched on offices being abolished. She indicated that under certificate of early retirement, the Respondent was not to get golden handshake. She was given notice and paid KShs. 204,105/= in full. That the Respondent declined to collect pension which was calculated as amounting to KShs. 146,772/=. She indicated that the Respondent was not entitled to gratuity or golden handshake. On cross-examination she stated that the Respondent had a case of indiscipline. She was demanding for a promotion. She was suspended without salary. The Respondent is said to have absconded duty and had to be suspended. She indicated that the Respondent did not work in July, 1992 and could not therefore be paid. She stated that the Respondent's details indicated that she was born in 1949 and was therefore aged 51 as of 2001. On re-examination she stated that the letter by the Respondent was the basis of her termination. The Respondent never appealed to KETRI but did to the Permanent Secretary in the Ministry. She stated that after suspension the Respondent was required to report to

work but she absented herself.

6. The trial court heard the matter and entered judgment in favour of the Respondent in the following terms:-

KShs. 100,000/= golden handshake.

- i. Gratuity for 12 years of KShs. 381,420/=.
- ii. Liberty to collect pension and provident fund offered.

7. Being dissatisfied with the trial court's finding, the Appellant filed this appeal on the following grounds:-

- i. *That the learned trial magistrate erred in law and in fact by failing to fully appreciate the body of evidence tendered by the Appellant and the Respondent in support of their respective cases.*
- ii. *That the learned trial magistrate erred in law and in fact in finding that the Respondent had proven her case with respect to her claim for golden handshake and gratuity.*
- iii. *That the learned trial magistrate erred in law and in fact by finding that the Respondent was entitled to a golden handshake and gratuity for the period between 1990 and 2001 and yet the Respondent's own documents did not support such a claim.*
- iv. *The learned trial magistrate erred in law in that by granting a gratuity for the period between 1990 and 2001, he totally ignored the express provisions of Section 35 of the Employment Act, 2007.*

8. It was the Appellant's submission that the Appellant vide a letter dated 3rd May, 2001 informed the Respondent that she would be retired early. The Respondent was meant to fill the identification for early retirement form which contained two categories of retrenchees i.e. category e(i) where the pensionable officer was entitled to a golden handshake of KShs. 100,000/= and category e(iii) which provided no golden handshake for officers of the age of 52 years and above. It was submitted that the taskforce for policy framework for the retrenchment of the Appellant's staff recommended that the retrenchment be implemented in two phases. In the first phased, 22 officers who were aged 52 years and above as at 1st July, 2000 would be given three (3) months notice of retirement and would draw benefits from the provident fund and those under TRYPEN managed by Kenya National Assurance Co. Ltd (then under receivership) would have to await until the official receiver made a decision on the dues. The second phase involved a total of 273 members of staff who were in excess posts that were earmarked for abolition. These staff would be retrenched due to the abolition of their offices and were entitled to a golden handshake of KShs. 100,000/=, severance payment based on three months' pay for each completed year worked prior to July, 1990 when there was no superannuation scheme, three months pay in lieu of notice and benefits from the provident fund. It was submitted that the Respondent filled in personal particulars and indicated that she was born in the year 1949 and was aged 52 by the time she was notified of her early retirement in the letter dated 3rd May, 2001. She was therefore entitled to get dues under category e(iii). It was submitted that the policy document provided for severance pay at the rate of 3 months for every completed year prior to July, 1990 therefore the trial court erred in granting gratuity for 12 years from 1990-2001. It was submitted that the award is contrary to Section 35 (5) of the Employment Act. It was submitted that the Respondent having been ordered to collect her pension and provident dues from the Appellant, that was the awardable amount and nothing more. It was contended that the Respondent having been a member of the provident fund could not be entitled to receive gratuity. On this point, the Appellant cited **James Musembi Mweu v. Buzeki Enterprises Limited (2014) eKLR.**

9. The Respondent on the other hand submitted that the Respondent's evidence that she was offered employment on 25th June, 1986 which she accepted on 15th August, 1986 was not denied. That the Respondent was in employment with the Appellant for thirty six (36) years until she was placed on early retirement on 4th May, 2001. It was submitted that the Respondent's employment was purportedly terminated on 16th July, 1992 and the management of the Appellant tried to frustrate and eventually terminated her employment. That even after the Respondent's remorse, the

Appellant still frustrated the Respondent. That during the period of her suspension she was not paid a single penny. It was the Respondent's submissions that the Appellant in calculating her age ignored the date and month she was born and only put its basis on the year. The Respondent submitted that Cap 229, Regulation of Wages and Conditions of Employment Act provided for the Appellant to pay gratuity to an employee upon retirement. That the Respondent was entitled to golden handshake under KETRI Reform Programme-Identification for Early Retirement and was pensionable under clause (e) (i) of the said document.

10. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at pg. 429**). The issues falling for this court's determination are:-

- a. ***whether golden handshake and gratuity was payable to the Respondent.***
- b. ***whether Employer-Employee contributions to the pension fund at Kenya National Assurance from 1st January, 1993 to 1st July, 1996 KShs. 43,755/= was payable to the Respondent.***
- f. ***whether the Respondent is entitled to Provident fund from July 1996 to July 2001 KShs. 266,016/= and***
- g. ***whether the Respondent is entitled to 10 ¹/₂ months salary @ KShs. 5,000/= per month KShs. 52,500/=.***

11. It was submitted that in the first phased, 22 officers who were aged 52 years and above as at 1st July, 2000 would be given three (3) months notice of retirement and would draw benefits from the provident fund and those under TRYPEN managed by Kenya National Assurance Co. Ltd (then under receivership) would have to await until the official receiver made a decision on the dues. The second phase involved a total of 273 members of staff who were in excess posts that were earmarked for abolition. These staff would be retrenched due to the abolition of their offices and were entitled to a golden handshake of KShs. 100,000/=, severance payment based on three months' pay for each completed year worked prior to July, 1990 when there was no superannuation scheme, three months pay in lieu of notice and benefits from the provident fund. This fact has not been contended by the Respondent. It is at this point to ascertain the age of the Respondent as at time of retrenchment. She contended that the Appellant failed to consider the month and date she was born and only relied on the year she was born. The form she filled detailing her personal information which I have read does not disclose the date and month she was born. There is also no evidence on record giving the said information. It is in that regard that this court has no otherwise but to use the year she was born in such calculation. It is note worthy that it is her fault that no details as to her date of birth were given. Having been born in the year 1949 she was aged 51 years as of the year 2000. She was therefore entitled to be given three (3) months notice of retirement and would draw benefits from the provident fund and those under TRYPEN managed by Kenya National Assurance Co. Ltd (then under receivership) would have to await until the official receiver made a decision on the dues. From the policy framework it is clear that one had to have attained the age of 52 years as at 1st July, 2000 and not by the date of receiving the notice. Gratuity is not payable to the Respondent having been a member of the provident fund as was correctly stated in **James Musembi Mweu =Vs= Buzeki Enterprises Limited** (supra). In view of the foregoing I find that the appeal has no merit, it is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 10th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

No appearance Burugu for the Appellant.

Mrs. Wangui Koech holding brief for the Respondent.